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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 345

BENJAMIN COLBY, *Petitioner*,

v.

SARAH P. COLBY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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October Term, 1962

No.

BENJAMIN COLBY, *Petitioner*

v.

SARAH P. COLBY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of Nevada entered on March 27, 1962.

CITATION TO OPINION BELOW

The opinion of the Nevada Supreme Court, printed in Appendix B hereto, *infra*, p. 2a, is reported in 369 P. 2d 1019.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on March 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3),

since rights are claimed under the Constitution and statutes of the United States.

QUESTIONS PRESENTED

In 1955 Nevada granted a divorce decree to respondent wife without an appearance by petitioner husband or personal service on him in Nevada. Subsequently the parties litigated the issue of the wife's bona fide domicile in Nevada before a court in Maryland, where the parties had been domiciled for some years prior to the wife's trip to Nevada. The Maryland court determined that the wife had no domicile in Nevada and that the Nevada decree was void. In an action by petitioner husband to set aside the 1955 decree the Nevada Supreme Court expressly denied full faith and credit to the Maryland judgment and held the 1955 decree a valid determination of marital status in Nevada. On the foregoing facts the questions presented are:

1. Whether the Full Faith and Credit Clause permits Nevada to ignore the Maryland judgment and to hold the 1955 decree, which is invalid in every other State, valid in Nevada.

2. Whether the 1955 decree was a denial of due process for lack of requisite jurisdiction, and whether the Nevada Supreme Court decision reaffirms the denial of due process.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved are U. S. Constitution, Article IV, Section 1 and 14th Amendment, Section 1; 28 U.S.C. Section 1738. They are printed in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE

On June 30, 1955 the Nevada District Court granted respondent wife Sarah P. Colby a divorce decree, although petitioner husband Benjamin Colby had neither appeared nor been served with process in Nevada. Prior to respondent's trip to Nevada in March 1955, the parties had been domiciled in Maryland for a number of years. In November 1957 a Maryland court granted petitioner husband a limited divorce and also decreed that respondent's 1955 Nevada divorce was null and void (R. 15). Respondent wife appeared personally in that action and pleaded in bar the Nevada decree of absolute divorce (R. 14). After a hearing in which the parties litigated the issue of whether the wife had a bona fide domicile in Nevada when she obtained her decree, the Maryland court found that she had committed a fraud upon the Nevada court, that she had been domiciled in Maryland and not in Nevada and that the Nevada court was without jurisdiction over the parties (R. 16-18). The Maryland Court of Appeals affirmed. *Colby* v. *Colby*, 217 Md. 35, 141 A. 2d 506 (1958). This Court denied a petition for certiorari, *sub. nom. Appleby* v. *Colby*, 358 U.S. 838 (Oct. 13, 1958).

In February 1960 petitioner sued in the Nevada District Court to vacate the 1955 decree; he alleged that the 1957 Maryland judgment was entitled to full faith and credit (R. 5-8).[1] On his motion for summary

[1] Meanwhile in 1959, in an earlier attempt to clarify his marital status, petitioner had sought declaratory relief in Florida, where the wife, who had remarried, was then living. The Florida court dismissed his complaint and in May 1960 the Florida District Court of Appeals affirmed, on the ground that under Florida law there was no justiciable controversy. *Colby* v. *Colby*, 120 So. 2d 797 (Fla. App., 1960).

judgment the Nevada District Court ruled that the Maryland judgment was entitled to full faith and credit; it set aside the 1955 Nevada divorce decree, declaring it null and void (R. 48-50).

The Supreme Court of Nevada reversed. *Colby* v. *Colby*, 369 P. 2d 1019 (March 27, 1962). It rejected petitioner's contention that the Full Faith and Credit Clause required Nevada to "recognize the Maryland decree as the binding determination of the parties' marital status *in Nevada.*" (emphasis in original) The court reasoned as follows (369 P. 2d at 1023):

> "Analysis demands the conclusion that Benjamin [petitioner] does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own State lawfully entered. Full faith and credit does not require, nor does it contemplate, such action from us."

The court also rejected petitioner's contention that Nevada's 1955 decree was void for lack of jurisdiction. It said, 369 P. 2d at 1022:

> "The record before us shows that the Nevada court had jurisdiction to enter the decree. Procedural due process was accorded the defendant therein. The decree was not void on the face of the record. . . ."[2]

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[2] The court further held that petitioner's action was not authorized under Rule 60(b) of the Nevada Rules of Civil Procedure, because the alleged fraud was not "extrinsic." The court stated at p. 1021:

> "The 'fraud' involved in the instant case is *simply* the finding by the Maryland court in a later action, that Sarah did not possess the required bona fide intent as to domicil

The court concluded (369 P. 2d at 1023):

> "We hold, therefore, that the default decree of divorce granted Sarah by the Nevada district court in 1955 is a valid, final and conclusive determination of the marital status of Sarah and Benjamin in Nevada; that a claim for relief is not asserted under the full faith and credit clause of the United States Constitution."[3]

REASONS FOR GRANTING THE WRIT

1. THE CASE PRESENTS IMPORTANT QUESTIONS UNDER THE FULL FAITH AND CREDIT CLAUSE.

A. Nevada's refusal to honor the 1957 Maryland judgment and the reaffirmation of Nevada's conflicting 1955 default decree offend the basic purpose of the Full Faith and Credit Clause.

The basic purpose of the Full Faith and Credit Clause is to attain uniformity and certainty in respect to the effect of judgments throughout the Nation. The Nevada decision here sought to be reviewed clashes with that objective.

Unlike the Nevada court in 1955, the Maryland court had jurisdiction over the parties and the subject mat-

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when she testified before the Nevada court, and thereby committed a 'fraud' upon it." (emphasis supplied)

The court also held (at p. 1022) that declaratory judgment was not available, but proceeded to grant declaratory judgment in favor of respondent by holding the 1955 decree valid in Nevada. 369 P. 2d at 1023.

[3] Although the Nevada court discussed local procedures under Rule 60(b), Nevada Rules of Civil Procedure, and under the Uniform Declaratory Judgments Act, it plainly recognized that, if the Full Faith and Credit Clause was applicable, it would be required to entertain the action and set aside the 1955 decree, notwithstanding its local procedures. *Broderick* v. *Rosner*, 294 U.S. 629, 639-643 (1953); *Kenney* v. *Supreme Lodge*, 252 U.S. 411, 415 (1920).

ter. Its judgment declaring the Nevada decree void for lack of the requisite domicile in Nevada was entitled to full faith and credit by sister States. *Sutton* v. *Leib*, 342 U.S. 402, 408 (1952); see *Davis* v. *Davis*, 305 U.S. 32, 42 (1938). Yet Nevada, the one State in the Union where a solemn public record—the 1955 decree of absolute divorce—squarely conflicts with the Maryland judgment, has denied full faith and credit.

Under the decisions of this Court the Maryland judgment should operate as a binding declaration of marital status in all fifty States. *Williams* v. *North Carolina II*, 325 U.S. 226 (1945); *Sutton* v. *Leib*, *supra*. Indeed, a federal statute provides that such a judgment "shall have the same faith and credit in *every* court within the United States" as it has in the State where it was entered. 28 U.S.C. § 1738 (emphasis supplied). If the Nevada decision remains law, a judgment in the State of domicile declaring an *ex parte* Nevada divorce void for lack of domicile will be entitled to full faith and credit in every State except Nevada where the divorce decree is on record. Although the divorce will be void elsewhere, it will remain valid in the divorce State. Confusion, uncertainty, and conflict will inevitably result in respect to marital status, property, inheritance and other matters.

This Court has held that a divorce decree shall be entitled to full faith and credit everywhere, if defendant has appeared and participated, *Sherrer* v. *Sherrer*, 334 U.S. 343, 351-352 (1948); *Coe* v. *Coe*, 334 U.S. 378, 384 (1948); *Johnson* v. *Muelberger*, 340 U.S. 581, 587 (1951). This binds the State where the parties were formerly domiciled, even though the result conflicts with the public policy of that State. *Sherrer* v. *Sher-*

rer and *Coe* v. *Coe, supra*. *A fortiori* the Maryland decree here should be given full faith and credit in Nevada. *Sutton* v. *Leib, supra*, 342 U.S. at 408. Maryland is the State where both parties were domiciled and the only State where they litigated the question of jurisdiction.

This Court has recognized that questions of the kind here presented involve federal issues of profound importance. See, *e.g.*, *Sherrer* v. *Sherrer*, *Coe* v. *Coe*, *Johnson* v. *Muelberger*, and *Sutton* v. *Leib*, all *supra*.

On the foregoing grounds alone, this Court should review the Nevada judgment.

B. Nevada's denial of full faith and credit conflicts with decisions of this Court, especially Sutton v. Leib.

In *Sutton* v. *Leib, supra*, this Court determined that a judgment in the State of domicile holding a Nevada divorce void for lack of bona fide domicile is entitled to full faith in every other State, including Nevada. This Court stated:

> "If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel, its decree of divorce would have been unassailable in other states. So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith *throughout the Nation, in Nevada as well as in Illinois.*" (emphasis supplied) (342 U.S. at 408)

The Nevada court below held *Sutton v. Leib* distinguishable. It characterized as dictum the statement that the decree was entitled to full faith in Nevada. 369 P 2d at 1022-1023. Actually, in the *Sutton* case this

Court reversed a specific holding below that the Nevada decree was valid in Nevada. 342 U.S. at 404.

The Nevada court justified its decision on the ground that the Constitution does not require it to give the Maryland decree "greater credit and respect than the prior decree of our own State lawfully entered." 369 P. 2d at 1023. But the essence of the Full Faith and Credit Clause compels Nevada to subordinate its own policy to the Maryland decree. *Johnson* v. *Muelberger, supra,* 340 U.S. at 584; *cf. Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 74-78 (1939). The queston whether Nevada's 1955 decree was "lawfully entered" was the very question which was litigated for the first time in Maryland, where the court found the decree was *not* lawfully entered.

Because the Nevada judgment below conflicts with this Court's controlling decision in *Sutton* v. *Leib,* the judgment should be reviewed.

C. If Sutton v. Leib is not controlling, this is an important case of first impression.

Assuming *arguendo* that *Sutton* v. *Leib* does not control, then this is an important case of first impression. It presents the question whether Nevada may grant an *ex parte* divorce without bona fide domicile of the plaintiff, and then deny full faith and credit to the judgment of a court with unquestioned jurisdiction, holding the Nevada decree void for lack of jurisdiction.

If *Sutton* v. *Leib* is not controlling, the novelty and importance of the case call for review.

II. THE 1955 DECREE AND NEVADA'S REAFFIRMANCE THEREOF VIOLATE THE DUE PROCESS CLAUSE.

The decision below raises important questions under the Due Process Clause. A divorce granted outside the domicile of either party and without personal jurisdiction over the defendant is invalid under the Due Process Clause in the State where it is granted. *Williams* v. *North Carolina II*, *supra*, 325 U.S. at 229; *Alton* v. *Alton*, 207 F. 2d 667, 676 (C.A. 3, 1953), certiorari granted, 347 U.S. 911 (1954), dismissed as moot, 347 U.S. 610 (1954); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. (1951) 193, 212, n. 57.

If respondent wife were domiciled in Nevada when the 1955 decree was granted, the Full Faith and Credit Clause would require sister States to recognize that decree. But clearly, as the Nevada Supreme Court tacitly admits, the 1955 decree was not entitled to such recognition. It was not so entitled because respondent did not have the requisite Nevada domicile in 1955. It follows, therefore, that the decree was invalid in Nevada under the Due Process Clause. For if a Nevada decree is given validity in that State, our ancient federal statute requires that the judgment "shall have the same full faith and credit in every court within the United States. . ." 28 U.S.C. § 1738. Here the 1955 decree, not being entitled to full faith and credit for lack of domicile, must be held invalid in Nevada, "because offensive to the Due Process Clause of the Fourteenth Amendment. 28 U.S.C. Section 1738." *Hanson* v. *Denckla*, 357 U.S. 235, 255 (1958); see *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957); Lorenzen, *Extra-Territorial Divorce—Williams* v. *North Carolina II*, 54 Yale L.J. (1945) 799, 806.

In oral argument below, petitioner contended that the 1955 decree was void for lack of the requisite domicile. The Nevada court rejected this contention and held, 369 P. 2d at 1022:

> "The record before us shows that the Nevada court had jurisdiction to enter the decree. Procedural due process was accorded the defendant therein. The decree was not void on the face of the record . . ."

These statements are groundless. (1) The record contained the Maryland findings and judgment which established conclusively that in 1955 the Nevada court was without jurisdiction. See *Barber* v. *Barber*, 47 Nev. 377, 222 Pac. 284 (1924). (2) In the 1955 action petitioner was not accorded procedural due process. On the contrary, the court adjudicated his marital status when neither party was domiciled in Nevada. (3) The statement by the court below that the 1955 decree was "not void on the face of the record" evades the whole question at issue. This Court held in *Williams* v. *North Carolina II*, *supra*, 325 U.S. at 234, that "simply because the Nevada court found that it had power to award a divorce decree cannot . . . foreclose reexamination by another State." For,

> "Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record."

Such "circular reasoning," as this Court has called it, is the very reasoning embraced in the Nevada opinion.

The 1955 decree was void for lack of jurisdiction and denied petitioner due process. In holding that "the default decree of divorce granted Sarah by the Nevada

district court in 1955 is a valid, final and conclusive determination of the marital status of Sarah and Benjamin in Nevada," the Nevada Supreme Court has reaffirmed and affixed its seal to the denial of due process. Such a decision should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Unless the Nevada judgment is reversed, it will measurably destroy the force of the Full Faith and Credit Clause. It will encourage migratory divorce States to disregard judgments of the State of domicile and to uphold invalid divorce decrees. It will result in confusion and uncertainty regarding marital status, property and inheritance. It will make for calloused acceptance of bigamous relations and lend support to the untenable proposition that an *ex parte* decree of divorce is impervious to effective attack.

Respectively submitted,

DAVID G. BRESS
1730 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner

August, 1962.

APPENDIX A

Constitutional Provisions and Statute Involved

Constitution, Article IV, Section 1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Constitution, 14th Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

APPENDIX B

[Filed March 27, 1962. C. R. Davenport, Clerk of the Supreme Court. By Doreas P. Wilson, Deputy Clerk]

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 4440

SARAH P. COLBY, *Appellant*,

v.

BENJAMIN COLBY, *Respondent*.

Appeal from summary judgment of the Eighth Judicial District Court, Clark County; David Zenoff, Judge. *Judgment reversed.*

JONES, WIENER & JONES and L. O. HAWKINS, of counsel, of Las Vegas for Appellant.

ROBERT E. JONES and MORSE & GRAVES, of Las Vegas, for Respondent.

Opinion

By the Court, THOMPSON, J.:

Sarah P. Colby, appellant, and Benjamin Colby, respondent will be hereafter referred to as "Sarah" and "Benjamin."

To understand the issues presented for our determination, mention must first be made of the history of litigation

between the parties regarding their marital status. On June 30, 1955, Sarah was granted a divorce from Benjamin by the Eighth Judicial District Court of Nevada. Benjamin did not appear therein. He was served with process in Washington, D. C. by "personal service outside the state," in accordance with NRCP 4(e) (2). His default was duly entered. On November 6, 1957, Benjamin was granted a divorce a mensa et thoro (separation from bed and board) from Sarah, by the Circuit Court of Maryland. In that action, Sarah appeared personally, pleading, among other matters, the prior Nevada default decree as a defense. In granting Benjamin relief, the Maryland court declared the Nevada decree to be "null, void and of no effect in law or in equity." Sarah appealed, and the Maryland Court of Appeals on May 20, 1958 affirmed the decree of the Circuit Court. Colby v. Colby, 217 Md. 35, 141 A. 2d 506.

Finding Sarah in Florida, Benjamin then brought suit in the Circuit Court of Florida, seeking declaratory relief as to his marital status. Sarah moved to dismiss the complaint therein, which motion was granted. Benjamin appealed. On May 20, 1960, the Florida District Court of Appeal affirmed the ruling of the lower court. Colby v. Colby, (Fla. 1960), 120 So. 2d 797. Among other things it held that the declaratory judgment procedure was not available to adjudicate rights of parties who had previously obtained a determination of those rights; that no justiciable controversy existed between them.

On February 2, 1960, after the ruling of the Florida Circuit Court, but before determination by the Florida appellate court, the present action was commenced by Benjamin in the Eighth Judicial District Court of Nevada. The complaint is labeled a "complaint to vacate and set aside a decree of divorce." The relief requested is that the Nevada default decree of June 30, 1955 be vacated and set aside. The predicate for his complaint is that the Maryland decree of November 6, 1957, granting him a divorce a mensa

et thoro, and declaring void the prior Nevada default decree, was entered by a court of competent jurisdiction, with both parties before it, and must be given full faith and credit by the courts of Nevada. Sarah moved to dismiss the complaint, asserting that it failed to state a claim upon which relief could be granted. That motion was denied by the court below, whereupon Sarah answered, denying the material averments of the complaint. Issue being joined, Benjamin then moved for summary judgment, pursuant to NRCP 56. The lower court granted summary judgment. It found that there were no genuine issues of fact to be litigated; that the Maryland decree was entitled to full faith and credit by the courts of Nevada; that Benjamin was entitled to have his marital status in Nevada clarified and determined, and had brought a proper proceeding for such relief. Accordingly, it ordered that the Nevada default decree granted Sarah on June 30, 1955 "be and the same is hereby declared null and void, vacated, set aside and held for naught, having no force or effect in law or equity." The present appeal is from the summary judgment thus entered.

Five errors are assigned.[1] We believe that all of them are necessarily embraced within the single issue; did Benjamin state a claim for relief? In our view, no claim for relief was stated, nor was it possible to do so under the circumstances here presented. In reaching this conclusion, we are compelled to resolve the following questions: First, is this action the "independent action * * * to set aside a

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[1] It is claimed that the lower court erred in holding:

(a) that the complaint stated a claim for relief;

(b) that no factual issues remained;

(c) that the alleged fraud was the basis for an independent action to set aside a Nevada decree;

(d) that the full faith and credit clause applies to this case;

(e) that a justiciable controversy was presented for determination.

judgment for fraud upon the court," contemplated by NRCP 60(b)? Second, does the Uniform Declaratory Judgments Act, NRS 30.010-30.160, provide a procedure by which Benjamin could obtain a declaration of his marital status in Nevada under the circumstances presented? Third, was this action otherwise properly instituted, and a claim for relief stated because of the full faith and credit clause of the United States Constitution? We turn to discuss these questions.

1. *This action is not authorized by NRCP 60 (b).* The present independent action was commenced almost five years after entry of the Nevada default decree. It sought to set aside such decree. The lower court granted the requested relief. This court has, for many years, recognized that a decree of divorce may be annulled by an independent proceeding for that purpose upon proof of extrinsic fraud. Confer v. District Court, 49 Nev. 18, 234 P. 688; Chamblin v. Chamblin, 55 Nev. 146, 27 P. 2d 1061; Calvert v. Calvert, 61 Nev. 168, 171, 122 P. 2d 426, 427; Lauer v. District Court, 62 Nev. 78, 140 P. 2d 953; Mazour v. Mazour, 64 Nev. 245, 180 P. 2d 103; Murphy v. Murphy, 65 Nev. 264, 271, 193 P. 2d 850, 854; Villalon v. Bowen, 70 Nev. 456, 273 P. 2d 409. In Murphy v. Murphy, supra, this court said: "Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the court by a false promise of compromise, or such conduct as prevents a real trial upon the issues involved or any other act or omission which procures the absence of the unsuccessful party at the trial. Further, it consists of fraud by the other party to the suit, which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial." Conversely, in Calvert v. Calvert, supra, we described intrinsic fraud in the following language: "A distinguishing feature appearing in the cases as to when fraud will justify the vacation of a decree is whether or not the wife has had the opportunity of consulting counsel of her own choosing, and the opportunity af-

forded to present the matters complained of to independent counsel and to the court, so that protection could be afforded. *Such an opportunity stamps the fraud as intrinsic.*" (Emphasis supplied.)

The "fraud" involved in the instant case is simply the finding by the Maryland court in a later action, that Sarah did not possess the required bona fide intent as to domicil when she testified before the Nevada court, and thereby committed a "fraud" upon it. Nothing appears from the record before us tending to establish that Benjamin was prevented by Sarah's conduct from a fair opportunity to assert his rights in or present his defenses to the Nevada action. It is apparent that he voluntarily elected to refrain from entering an appearance therein. Clearly the "fraud" here contended for is intrinsic; it is not extrinsic.

Insofar as the question of fraud is concerned, we do not find any solid basis for distinction between the case at bar and the cases of Confer v. District Court, supra, and Chamblin v. Chamblin, supra. In Confer v. District Court, supra, the husband obtained a Nevada divorce. The wife appeared in the action by answer and cross complaint. After trial, the court entered a decree for the husband. Almost two years later the former wife commenced an independent suit, seeking to set aside the divorce decree, claiming that the court was without jurisdiction because the plaintiff's testimony therein was false in that he never intended to make Nevada his bona fide home and domicil. This court found that the alleged fraud was not extrinsic in nature, and dismissed the proceeding. In Chamblin v. Chamblin, supra, a former wife brought an independent action to set aside her former husband's decree, claiming that it was obtained on perjured testimony. This court held that the complainant had been afforded every opportunity to appear and defend the prior suit; that the claimed fraud was not extrinsic in nature, and that a cause of action was not, therefore, asserted. We hold that the complaint

herein fails to state a claim for relief based upon extrinsic fraud.

Notwithstanding, Benjamin urges that an independent action to set aside the prior default decree is proper under NRCP 60 (b) because such prior decree is void. His argument in this regard is that the Maryland decree had the effect of rendering the prior Nevada decree void. We find no merit in this argument. It is true that in La Potin v. La Potin, 75 Nev. 264, 339 P. 2d 123, we held that an independent action was proper, under the mentioned rule, to set aside a prior decree, where the record established that the defendant in the prior action was never served with process; the court was, in fact, without jurisdiction, and the decree was void. See also: Perry v. Seventh Judicial District Court, 42 Nev. 284, 174 P. 1058. However, the instant case is totally different. The record before us shows that the Nevada court had jurisdiction to enter the decree. Procedural due process was accorded the defendant therein. The decree was not void on the face of the record and, for the reasons heretofore mentioned, extrinsic fraud has not been shown.

We conclude, therefore, that the present action is not the "independent action * * * to set aside a judgment for fraud upon the court," contemplated by NRCP 60(b), and that a claim for relief thereunder is not presented.

2. *This action is not authorized by the Uniform Declaratory Judgments Act.* The complaint herein does not specifically request relief under the Uniform Declaratory Judgments Act. It does, however, contain the charge that the marital status of the parties is uncertain. The judgment entered expresses the lower court's view that Benjamin "is entitled to have his marital rights and status clarified and determined." The briefs on appeal mentioned declaratory relief, as did counsel in oral argument. Sarah, the respondent, does not contend that we should refuse to consider said Act because of the characterization of the complaint as one

to "vacate and set aside a decree of divorce." Rather, she has assumed that we will consider it. Therefore, we believe ourselves compelled to determine whether the present action is authorizd by that Act. NRS 30.010-30.160.

NRS 30.030 provides in part: "* * *; and such declaration shall have the force and effect of a final judgment or decree." The final decree determining the marital status of Sarah and Benjamin in Nevada was entered by the district court on June 30, 1955. In Kress v. Corey, 65 Nev. 1, 26, 189 P. 2d 352, 364, this court quoted with approval a statement from Borchard, Declaratory Judgments, wherein four requisite precedent facts for declaratory relief are summarized. One of them is that "the issue involved in the controversy must be ripe for judicial determination." The question concerning marital status was "ripe for determination" by the Nevada court in 1955, and was then determined. No appeal was taken from that determination. The court was acting within its jurisdiction when it made it. It is not subject to attack upon the claim of extrinsic fraud, for the reasons heretofore given. A justiciable issue as to the parties' marital status in Nevada, does not now exist. Colby v. Colby, (Fla. 1960), 120 So. 2d 797; Garvin v. Garvin, 306 N.Y. 118, 116 N.E. 2d 73.

We conclude that, under the circumstances of this case, a claim for relief under the Uniform Declaratory Judgments Act is not stated.

3. *Full Faith and Credit:* The primary thrust of respondent Benjamin's argument in support of the judgment entered below rests upon the full faith and credit clause of the United States Constitution. Because of that clause he insists that Nevada must recognize the Maryland decree as the binding determination of the parties' marital status *in Nevada.* Sutton v. Leib, 342 U. S. 402, 96 L. Ed. 440, is cited as supporting authority. We do not consider that case to be in point. In Sutton v. Leib, supra, the marital status of the former Mrs. Leib was in issue. She was the

plaintiff. Her marital status had never been before a Nevada court for determination. She had never been a party to a judicial proceeding in Nevada. She had married a Mr. Henzel after he had obtained a Nevada default divorce. That marriage was later annulled and declared void by a New York court with personal jurisdiction over both parties. In holding that the Illinois federal court must give full faith and credit to the New York annullment decree (and stating, by dictum, that Nevada would have to do the same), *the Supreme Court did not indicate that Mr. Henzel's Nevada divorce was not valid in Nevada.* That question was not presented for decision. It is presented in the case at bar.

Analysis demands the conclusion that Benjamin does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own State lawfully entered. Full faith and credit does not require, nor does it contemplate, such action from us. Perry v. Perry, 51 Wash. 2d 358, 318 P. 2d 968; Hammell v. Britton, 19 Cal. 2d 72, 119 P. 2d 333; Martin Bros. Box Co. v. Fritz, 228 Iowa 482, 292 N.W. 143.

The judicial status of a prior default decree in the state that decreed it, has not been definitely determined by the United States Supreme Court. However, in Williams v. North Carolina, 325 U. S. 226, 231, 239, 89 L. Ed. 1577, 1582, 1587, the majority opinion, written by Mr. Justice Frankfurter appears to assume the validity of the prior Nevada default decree in Nevada, for he wrote, inter alia: "If a finding by the Court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce." Mr. Justice Murphy, in

his concurring opinion in Williams v. North Carolina, supra, stated: "The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give its divorce decrees absolute and binding finality within the confines of its borders."

Mr. Justice Rutledge and Mr. Justice Black, in dissenting opinions in that case, each called attention to the fact that the majority opinion therein does not hold that the Nevada judgment is invalid in Nevada.

We hold, therefore, that the default decree of divorce granted Sarah by the Nevada district court in 1955 is a valid, final and conclusive determination of the marital status of Sarah and Benjamin in Nevada; that a claim for relief is not asserted under the full faith and credit clause of the United States Constitution.

Reversed.

THOMPSON, J.

We concur:

BADT, C.J.

McNAMEE, J.

ATTEST: A full, true and Correct Copy. C. R. Davenport, Clerk of the Supreme Court.
DORCAS P. WILSON, *Deputy.*

APPENDIX C

Judgments of the Supreme Court

Appeal from the Eighth Judicial District Court, Clark County, Nevada. Honorable David Zenoff, District Judge

SARAH P. COLBY, *Appellant,*

vs.

BENJAMIN COLBY, *Respondent.*

JONES, WIENER & JONES
L. O. HAWKINS
Attorneys for Appellant

ROBERT E. JONES
MORSE & GRAVES
Attorneys for Respondent

No. 4440

APPEAL FROM JUDGMENT

This case came on regularly to be heard on the 20th day of March, 1962, it being a regular day of the January 1962 term of this court, when Louis Wiener, Jr., Esq., of the firm Jones, Wiener & Jones, counsel for appellant, and William R. Morse, Esq., of the firm Morse & Graves, and Robert E. Jones, Esq., counsel for respondent, were duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular the law and the premises having been seen, heard and duly considered, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by Thompson, J., concurred in by Badt, C. J., and McNamee, J., to the effect:

"Reversed."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 27th day of March, 1962.

STATE OF NEVADA, ss.

I, C. R. Davenport, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that foregoing is a full, true and correct copy of judgment entered in Vol. 9 of judgment docket, at page 245, in the matter of Colby v. Colby, No. 4440.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 8th day of August, 1962.

C. R. DAVENPORT
Clerk of Supreme Court of the State of Nevada

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 345

BENJAMIN COLBY, *Petitioner*

v.

SARAH P. COLBY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 345

BENJAMIN COLBY, *Petitioner*

v.

SARAH P. COLBY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

In 1955, Respondent instituted an action for divorce against Petitioner in the Nevada District Court. Her Complaint contained allegations of fact with reference to her period of domicile and physical presence in the State of Nevada for more than six weeks preceding the commencement of her action, sufficient to comply with the applicable Nevada statute. Constructive service of process was made upon Petitioner both by personal service outside of Nevada and by publication. He did

not enter an appearance and his default was duly entered. Subsequently a hearing took place and evidence was received by the Nevada District Court. After considering the evidence and the law, the Nevada District Court made various findings of fact, including a finding that Respondent had been a bona fide and actual resident and domiciliary of the State of Nevada for the requisite statutory period. A Decree of Divorce was granted the Respondent. Thereafter, the Maryland proceedings described on Page 2 of the Petition for a Writ of Certiorari took place.

The questions presented are:

1. Whether the Full Faith and Credit Clause obliges Nevada to substitute the finding of fact of the Maryland Court on the question of domicil for the earlier finding of the Nevada District Court and thereby invalidate the Nevada Decree of Divorce.

2. Whether the 1955 Decree of Divorce or the Nevada Supreme Court decision constituted a denial of due process for lack of requisite jurisdiction.

SUPPLEMENTAL STATEMENT OF THE CASE

This supplemental statement is rendered advisable by the complete omission in the Petition of any reference to the domiciliary finding of fact in the original Decree of Divorce. Paragraph I of Respondent's Complaint for Divorce reads as follows:

> "For more than six weeks immediately preceding the commencement of this action, plaintiff has been, and now is, a bona fide and actual resident and domiciliary of the State of Nevada, and has been actually and *corporally* present in said State for more than six weeks prior to the commencement of this action."

The Decree of Divorce granted Respondent (plaintiff in that action) contains the following finding of fact among others:

> "and the Court having duly considered the law and the evidence, finds that the plaintiff . . . for more than six weeks prior to the commencement of this action was, and now is, a bona fide and actual resident and domiciliary of the State of Nevada."

In November, 1957, a Maryland Circuit Court judge after consideration of a record made before a Commissioner, made her own finding of fact on the issue of whether the Respondent had a bona fide domicil in Nevada when she obtained her decree of divorce.

The Supreme Court of Nevada rejected the contention that it is obliged by full faith and credit to invalidate a Nevada trial court decree based on an express finding of fact because of a conflicting finding of fact made subsequently by the Maryland court. In holding the decree of divorce granted Respondent by the Nevada District court to be a valid, final and conclusive determination of the marital status of Petitioner and Respondent in Nevada, the Nevada Supreme Court said:

> "Analysis demands the conclusion that Benjamin does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own State lawfully entered. Full faith and credit does not require, nor does it contemplate such action from us." *Colby* v. *Colby* (Nev.), 369 P. (2d) 1019.

REASONS FOR DENYING THE WRIT

I. THE CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Nevada District Court Had Jurisdiction to Grant Respondent a Valid Decree of Divorce

Williams v. *North Carolina I.*, 317 U.S. 287 (1942), settled affirmatively the jurisdiction of a state court to grant a decree of divorce to a spouse domiciled in that State where the requirements of procedural due process have been satisfied, notwithstanding that the other spouse did not appear in the divorce suit and was not personally served with process in the State in which the divorce was granted. That valid constructive service of process was made on Petitioner in the original divorce proceeding, in accordance with Nevada procedural law, is established by the finding of fact contained in the decree of divorce. Whatever the courts of any one or all of the other 49 States might subsequently rule or hold with reference to the disputed fact of domicil by Mrs. Colby in Nevada, it is clear that under the holding of *Williams I*, the Nevada District Court had the requisite authority and jurisdiction to grant the decree of divorce based on its finding that the plaintiff spouse had domicil in Nevada of sufficient duration to satisfy the applicable Nevada statute. That the Maryland court had the right to make its own inquiry into the facts of Mrs. Colby's Nevada domicil is equally clear. *Williams* v. *North Carolina II*, 325 U.S. 226 (1945). Any one of the states outside of Nevada, having personal jurisdiction over the parties, could have so inquired. That Maryland became the forum for that purpose was a mere happenstance. The Maryland court found that Mrs. Colby was not, in fact, domiciled in Nevada. Conceivably, the courts of others of the remaining 49

States would have arrived at the opposite conclusion. Petitioner contends that the Nevada court is required by full faith and credit to permit its own finding of fact of domicile to be obliterated by a contrary finding made by the court of the first sister State which happens to be called upon for a ruling.

The foregoing contention does not warrant review of the Nevada judgment.

B. Sutton v. Leib Neither Controls nor Conflicts With the Nevada Judgment

The facts in *Sutton* v. *Leib*, 342 U.S. 402 (1952), present a situation distinguishable from the present one: Mrs. Sutton divorced her then husband, Leib, in Illinois; one Henzel, obtained a divorce in Nevada from his wife who had not been served in Nevada nor appeared in the Nevada proceeding. Subsequently, a New York court declared the Nevada divorce decree void. Mrs. Sutton then obtained a New York decree annulling her marriage with Henzel. She then sued her original husband, Leib, in Illinois for unpaid alimony installments. The Court held that the New York annulment decree was entitled to full faith and credit in Illinois. The case sheds no light whatever on the question of whether Nevada would have had to give full faith and credit to the New York decree declaring the earlier Nevada decree of divorce void for lack of domiciliary jurisdiction over the plaintiff in that proceeding, Mr. Henzel. The following statement appearing on pp. 7-8 of the Petition is inaccurate:

> "Actually in the Sutton case this Court reversed a specific holding below that the Nevada decree was valid in Nevada." 342 U.S. at 404.

Petitioner this has confused the "Nevada decree" with the "Nevada marriage". In discussing the basis of the affirmance of the Seventh Circuit Court of Appeals, this Court said:

> "The affirmance was bottomed on the conclusion that, as the Nevada marriage of petitioner was valid in Nevada, it terminated the liability for alimony under the Illinois judgment of divorce."

The following statement on page 8 of the Petition is likewise inaccurate:

> "The question whether Nevada's 1955 decree was 'lawfully entered' was the very question which was litigated for the first time in Maryland . . ."

Under the ruling in *Williams* v. *North Carolina I*, *supra*, that question was litigated in the Nevada District Court in the original divorce proceeding in 1955. Mrs. Colby was before the Court which had jurisdiction over Mr. Colby under Nevada procedural rules, by constructive service. The issue of domicile was fully tried and a clear finding of fact made. *Johnson* v. *Muelberger*, 340 U.S. 581 compels a state *other than the state of original judgment* to subordinate its own policy to a decree for which full faith and credit is sought. Like *Sutton* v. *Leib*, *supra*, it does not require, hold, or suggest that the courts of the state which issued the original divorce decree must accept a finding of fact made by the court of another state, or, conceivably, by a jury, impanelled in another state, as in *Williams* v. *North Carolina II*, *supra*, as a basis for invalidating its own decree.

C. Williams v. North Carolina II Decided the Major Question Which This Petition Seeks to Present

In holding, in *Williams* v. *North Carolina II*, *supra*, that North Carolina had the power to refuse full faith and credit to the Nevada divorce decree on the basis of its own finding of fact that no bona fide domicil was acquired in Nevada, this Court left no room for doubt that Nevada would not be required to give full faith and credit to the North Carolina judgment, thereby invalidating its own decree. Mr. Justice Frankfurter quoted with approval the following statement from *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292:

> "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries."

The ruling in *Tilt* v. *Kelsey*, 207 U.S. 43, is likewise quoted with approval:

> "On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased."

After ruling that it would be "intolerable" to permit the finding of domicil by Nevada "to foreclose all States", Mr. Justice Frankfurter, on page 232 made perfectly clear that by a parity of reasoning, North Carolina does not have the authority or power to force Nevada to cancel out its own decree of divorce:

> "But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one

> spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our Federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State." (Page 232)

That the North Carolina finding of no domicil would have to exist side by side with the conflicting Nevada finding of domicil is thus stated:

> ". . . we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the Court of original judgment warrant for its finding that it had jurisdiction." (Page 234)

Again on Page 237, Mr. Justice Frankfurter comments that both North Carolina and Nevada are entitled to their respective views on the question of domicil:

> "And so we cannot say that North Carolina was not entitled to draw the inference, that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, *were it our business to do so*, the contrary finding of the Nevada Court." (emphasis supplied)

That conflicting rulings of various state courts on the factual issue of domicil must be permitted to subsist as "one of those untoward results inevitable in a Federal system in which regulation of domestic relations

has been left with the States and not given to the national authority". is Mr. Justice Frankfurter's conclusion.

Mr. Justice Murphy, in his concurring opinion, left no room for doubt as to his agreement with the majority opinion:

> "The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders." (Page 239)

Finally, Mr. Justice Rutledge, in his dissenting opinion affirms the validity of the Nevada divorce decree within the confines of Nevada in plain terms:

> "Nevada's judgment has not been voided. It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached. For all that has been determined or could be, unless another change is in the making, petitioners are lawful husband and wife in Nevada. *Williams* v. *North Carolina I*; *Williams* v. *North Carolina II*." (Page 244)

It is significant that Mr. Justice Rutledge cites the majority opinion as authority in support of the foregoing view. It is evident that he regards *Williams II* as controlling on the very question which the Petitioner herein describes as "novel". Leaving no possible doubt in the mind of anyone, Mr. Justice Rutledge again analyzes the majority ruling:

> "What, exactly are the effects of the decision? The Court is careful not to say that Nevada's judg-

ment is not valid in Nevada. To repeat, the Court could not so declare it, unless a different test applies to sustain that judgment than supports North Carolina's. Presumably the same standard applies to both; and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicil, as it always does when the question becomes important." (Page 246)

His last word on the point is:

> "The necessary conclusion follows that the Nevada decree was valid and remains valid within her borders." (Page 247)

It is Respondent's view that Mr. Justice Rutledge correctly analyzed the majority opinion in *Williams v. North Carolina II, supra,* as holding that while North Carolina was not obliged to give full faith and credit to the Nevada decree, Nevada was equally without obligation to vacate its own decree.

D. The Ruling of the Nevada Supreme Court Is Supported by the Decisions of All State Courts of Last Resort Which Have Ruled on the Point

Even before the decision of this Court in *Williams v. North Carolina II, supra,* the Courts of all state courts of last resort called upon to rule on this point, were unanimous in holding that the court of original judgment is not bound by full faith and credit to invalidate is own judgment on the basis of a contrary finding of jurisdictional facts by another state.

Perry v. *Perry,* 51 Wash. (2d) 358, 318 P. (2d) 968

Hammell v. *Britton,* 19 Cal. (2d) 72, 119 P. (2d) 333

Martin Bros Box Co. v. Fritz, 228 Ia. 482, 292 N.W. 143

The language of the Iowa Supreme Court was prophetic of the rulings to be made many years later in *Williams* v. *North Carolina II*, *supra*:

> "We know of no decision which would support the proposition that, if a judgment has been adjudicated to be valid and enforcible by a Court in Iowa, but enforcement of such judgment is thereafter refused by a court in Indiana, the Iowa Court must then follow the example of the Indiana Court and also refuse to enforce such judgment. We are willing to so construe the full faith and credit clause."

II. THE NEVADA JUDGMENT DOES NO VIOLENCE TO THE DUE PROCESS CLAUSE BECAUSE THE NEVADA DISTRICT COURT MADE A FINDING OF FACT, BASED UPON EVIDENCE, THAT MRS. COLBY HAD THE REQUISITE DOMICIL IN NEVADA

The argument appearing on pp. 9-11 of the Petition rests upon the fallacious reasoning that Mrs. Colby was not domiciled in Nevada in 1955, because a Maryland court so found subsequently. It completely ignores the finding of fact of the Nevada District Court. The ruling that the Nevada trial court had jurisdiction to enter the decree is characterized as "groundless". All of the Justices who wrote opinions in the *Williams* v. *North Carolina II*, *supra*, disagree with the foregoing characterization. It would appear that the Petition is itself based upon a prime example of "circular reasoning". It is there argued:

(1) Mrs. Colby was not domiciled in Nevada in 1955, because

(2) The Maryland court so found in 1957.

(3) Therefore the Nevada decree was void for lack of jurisdiction and denial to petitioner of due process.

The foregoing structure of reasoning collapses when it is considered that the Nevada District Court made a finding of the fact of domicil, together with requisite jurisdiction over the defendant resting on constructive service of process under the law of Nevada. *Williams v. North Carolina I, supra,* so holds and is controlling.

The contention that the original decree of divorce denied the defendant due process is without merit and does not warrant the granting of certiorari.

CONCLUSION

The judgment of the Nevada Supreme Court is wholly in accord with the decision of this Court in *Williams v. North Carolina II, supra.* The present Petition therefore fails to satisfy the requirements of Supreme Court Rule 19, 1(a). All courts which have ruled upon the question under consideration, this Court and the Supreme Courts of Nevada, Washington, California and Iowa are unanimous in holding that full faith and credit does not require the state of original judgment to yield its own judgment to that of a court or jury of another state. For the foregoing

reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1962.